Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. § 54.207(c), for Commission Agreement in Redefining the Service Area of CenturyTel of Eagle, Inc., A Rural Telephone Company	)	CC Docket No. 96-45

To: The Commission

COMMENTS OF N.E. COLORADO CELLULAR, INC.

N.E. Colorado Cellular, Inc. ("NECC"), by counsel and pursuant to the Commission's *Public Notice* dated April 12, 2004,[1] provides comments in the above-captioned proceeding. The Colorado Public Utilities Commission's ("COPUC") petition seeking the FCC's agreement with its service area redefinition of CenturyTel of Eagle, Inc. ("CenturyTel") became effective as of November 26, 2002 pursuant to 47 C.F.R. Section 54.207(c)(3)(ii). On December 17, 2002, CenturyTel filed an Application for Review or, Alternatively, Petition for Reconsideration. NECC filed an opposition on January 2, 2003 ("Opposition").[2]

Over the past year, NECC has been advancing universal service and competition in CenturyTel's service area with federal high-cost support. NECC has upgraded its system with advanced digital capabilities, constructed new cell sites, and provided high-

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[1] *Parties Are Invited To Update The Record Pertaining To Pending Petitions For Eligible Telecommunications Carrier Designations*, DA-04-999 (April 12, 2004). These comments are filed with the Chief, Wireline Competition Bureau, who has delegated authority pursuant to 47 C.F.R. Section 54.207(e).

[2] For the Commission's convenience, a copy of NECC's Opposition is attached hereto and incorporated by reference.

quality service to consumers, some of whom are choosing NECC's service as a replacement to rural ILEC services in northeastern Colorado, including that of CenturyTel.

As set forth below, the Commission should affirm its decision to permit the redefinition of CenturyTel to become effective.

I. THE SCOPE OF A SECTION 54.207 PROCEEDING IS LIMITED

The case below was solely about whether the FCC should concur with the COPUC's decision, by rule, to define CenturyTel's service area so that each wire center is a separate service area. This case is not about defining NECC's ETC service area. That decision has been made by a final and unappealable order.

In its decision, which is now a final and unappealable order, COPUC determined that it was in the public interest to grant ETC status to NECC for a defined service area within Colorado. In so doing, the MPUC exercised statutory authority that lies solely with the state. Determinations as to the contours of a competitive ETC's service area and whether the public interest would be served by designating a competitive ETC are solely within the province of a state's jurisdiction to designate ETCs under Section 214(e)(2).[3] Thus, unless it has relinquished jurisdiction to the FCC, only a state may determine whether it is in the public interest to designate a competitor such as NECC in all or part of an ILEC's service area. Moreover, a state commission's public interest determination under Section 214(e)(2) is not a "statute, regulation, or legal requirement" and therefore is not subject to preemption by the FCC under Section 253(d).

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[3] As NECC pointed out in its Opposition, CenturyTel's misguided attempt to inject a new public interest determination into a service area redefinition proceeding, where none exists in the law, must be rejected. NECC Opposition at p. 8.

CenturyTel had multiple opportunities to participate in proceedings before COPUC wherein NECC's service area was designated and, in a separate proceeding, wherein the COPUC adopted a rule that makes a rural ILEC's service area consistent with it plan of disaggregation. Years ago, COPUC's decisions became final, unappealable orders, no longer subject to review or reconsideration. CenturyTel has no right to pursue further appeals of COPUC's decisions here at the FCC.[4]

The COPUC's petition to the FCC seeking concurrence with its service area redefinition for CenturyTel follows the framework set up by Congress, in Section 214(e) of the 1996 Act, 47 U.S.C. Section 214(e), and the FCC in Section 54.207 of the rules. The state and the FCC must agree on any redefinition of ILEC service areas made necessary by the designation of a competitive ETC in an area that is different from an ILEC study area. The scope of a redefinition proceeding under Section 54.207 is limited to criteria articulated by the Federal-State Joint Board on Universal Service ("Joint Board").

The Joint Board's stated concerns about redefining rural ILEC service areas have been in place for a number of years and have been addressed in numerous cases throughout the country, including NECC's ETC designation proceeding in Colorado (Docket Nos. 00A-315T and 00A-491T).[5] Under Section 54.207, neither the FCC nor the state has authority to dictate the service area redefinition of a rural ILEC. The parties must reach agreement.

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[4] See, NECC Opposition at pp. 4-6.

[5] See, Federal-State Joint Board on Universal Service (Recommended Decision), 12 FCC Rcd 87 (Jt. Bd., 1996).

II. THE FCC SHOULD FOLLOW COPUC'S WELL CONSIDERED DECISION TO REDEFINE CENTURYTEL'S SERVICE AREA

Concerns raised by the Joint Board focus on whether the proposed redefinition of rural ILEC service areas would, (1) permit NECC to intentionally or unintentionally cream skim low-cost areas of CenturyTel, (2) impose any undue administrative burdens on CenturyTel, or (3) properly recognize CenturyTel's status as rural telephone companies. These concerns were thoroughly considered by COPUC. As set forth in COPUC's original petition in this proceeding, COPUC has conducted rulemaking proceedings which have established rules for redefining rural ILEC service areas. COPUC included with its petition copies of its decisions.[6]

Following a notice and comment rulemaking proceeding, COPUC determined that the service areas of rural ILECs shall match the disaggregation plans of those companies that have selected either Path 2 or Path 3 under 47 C.F.R. Section 54.315. As noted in COPUC's Petition in this proceeding, CenturyTel and the Colorado Telecommunications Association ("CTA") actively participated in COPUC's rulemaking docket leading to the adoption of the applicable rules.[7] COPUC's decision regarding CenturyTel's service area redefinition is a final and unappealable order. Thus, by rule, CenturyTel's service area is defined to be coterminous with its 53 wire centers in Colorado.[8] That is, each of CenturyTel's 53 wire centers is a separate service area.

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[6] See, Decision No. C02-319 (Mailed Date: March 18, 2002); Decision No. C02-530 (Mailed Date: May 7, 2002).

[7] See, COPUC Petition at p. 6.

[8] See, 4 CCR 723-42-11 ("The Commission will use the disaggregation plans of each incumbent Eligible Telecommunications Carrier established pursuant to Rule 10 not only for disaggregation of Colorado HCSM support but also for the disaggregation of the study area of the rural incumbent local exchange carrier pursuant to 47 CFR Section 54.207 into smaller discrete service areas.")

In its Petition in this proceeding, COPUC stressed that an obligation to serve all 53 CenturyTel wire centers "would be excessively burdensome for any potential new entrant."[9] In NECC's view, requiring any competitor to serve throughout CenturyTel's disparate service area, spread across much of the state of Colorado, would amount to an illegal barrier to entry pursuant to Section 253 of the Act, 47 U.S.C. Section 253.

Given that CenturyTel has already disaggregated support, COPUC has ruled that concerns about cream skimming, or the effect of cream skimming, are moot. Since CenturyTel retains the option under Path 2 to file a request with COPUC to disaggregate support further, CenturyTel has an avenue to correct any deficiencies it now believe present in its previously filed plan.[10]

COPUC has performed its duty in complete and well-considered proceedings, pursuant to which all parties have had full opportunity to air their views. CenturyTel made no credible showing as to how it would, or could, be harmed, and, as evidenced by COPUC's recent comments, nothing in either *Virginia Cellular* or *Highland Cellular* has persuaded the COPUC to alter its decision.[11]

The FCC should also concur with COPUC's proposed service area redefinition, made by rule, because the COPUC is in the best position to determine what is best for its rural citizenry. The state's closer oversight of telephone companies under its jurisdiction and its historical view of the state's telecommunications needs and infrastructure are

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[9] COPUC Petition at p. 1.

[10] Under the Path 2 option set forth in 47 C.F.R. Section 54.315(c), rural ILECs may disaggregate into an unlimited number of sub-wire center cost zones to prevent uneconomic support from flowing to competitors.

[11] See Supplement to Petition by the Colorado Public Utility Commission, filed with the FCC in this proceeding on May 14, 2004.

substantial reasons why Congress delegated to state commissions in the first instance authority to perform ETC designations.

Here, the COPUC has found that disaggregation of high-cost support is sufficient to protect rural ILECs from competitors receiving uneconomic support levels, even unintentionally. Those that have disaggregated support are protected from uneconomic competition and those that have not disaggregated may still do so pursuant to Section 54.315 of the FCC's rules, 47 C.F.R. Section 54.315.

The FCC is bound by statute to respect a state's judgement, made pursuant to 47 U.S.C. Section 214(e)(2), with respect to whether it is in the public interest to designate a competitor as an ETC in specific rural ILEC service areas. In addition, the FCC should respect the state's judgement regarding whether an ILEC service area should be redefined pursuant to Section 214(e)(5), especially where, as here, that decision has been made pursuant to a notice and comment rulemaking proceeding. Deferring to a state's expertise would be consistent with the FCC's recent request that the Virginia Corporation Commission examine the FCC's proposed service area redefinition of Virginia Cellular "based on its unique familiarity with the rural areas in question."[12]

III. CONCLUSION

The COPUC has properly considered and reaffirmed its decision to redefine CenturyTel's service area consistent with its plan of disaggregation along wire center boundaries. Therefore, FCC concurrence effective as of November 26, 2002 was entirely appropriate. NECC respectfully requests the FCC to promptly issue an order affirming its decision to concur with the COPUC's redefinition of CenturyTel's service area so that

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[12] *Virginia Cellular, supra* at 1582.

high-cost support can continue to benefit Colorado's rural consumers in CenturyTel's service area.

Respectfully submitted,

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May 28, 2004

CERTIFICATE OF SERVICE

I, Kimberly Verven, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 28th day of May, 2004, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Comments of N.E. Colorado Cellular, Inc.* filed today to the following:

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STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
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Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. Section 54.207(c), for Commission Agreement in Redefining the Service Area of CenturyTel of Eagle, Inc., a Rural Telephone Company	)	

OPPOSITION OF N.E. COLORADO CELLULAR, INC.

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January 2, 2003

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Summary

CenturyTel's attack on the FCC's concurrence with the decision of the Colorado Public Utilities Commission ("CPUC") to redefine CenturyTel's service area betrays a fundamental misunderstanding of the FCC's role in the redefinition of local exchange carrier service areas. Under Section 214(e)(5) of the Act, the FCC's role is merely to decide whether or not to concur with a state commission's considered determination to define a rural local exchange carrier's service area as something other than its entire study area. In fulfilling this role, the FCC has appropriately developed expedited procedures to prevent needless delay that would come with duplicating the proceedings that led to the state commission's determination.

Despite this clearly delineated statutory role, CenturyTel now argues that the FCC should reverse its concurrence and conduct a *de novo* review of a state's redefinition determination. CenturyTel and other parties have had ample opportunity to raise objections in multiple proceedings in Colorado that led to the filing of the CPUC's Petition. By opening a new proceeding, as CenturyTel requests, the FCC would engage in wasteful re-litigation of the same issues that were exhaustively considered at the state level, a fact that the FCC understood when it adopted Section 54.207 of its rules.

Contrary to CenturyTel's suggestion, Section 214(e)(5) of the Act does not give the FCC the authority to overrule the CPUC's conclusion that NECC's designation as an eligible telecommunications carrier ("ETC") in CenturyTel's service area is in the public interest. Moreover, CenturyTel has completely failed to explain (both before the CPUC and here) how the public will be harmed by the redefinition of its service area, and any "cherry picking" concerns were fully addressed by CenturyTel's disaggregation of

support to the wire center level. The FCC should summarily reject attempts to re-litigate decisions made below, which are final.

CenturyTel is also wrong in insisting that the FCC should have issued a written decision to provide "evidence" that it considered the recommendations of the Federal-State Joint Board on Universal Service ("Joint Board"). By enacting Section 214(e)(5), Congress did not require the FCC to make written findings, instead giving the FCC the discretion to develop the appropriate procedure. In accordance with the Act's pro-competitive, deregulatory purposes, and consistent with its longstanding use of streamlined review to prevent needless administrative delay, the FCC properly adopted an expedited procedure allowing for swift concurrence unless there are compelling reasons to open a proceeding. These procedures ensure that the FCC takes the Joint Board's recommendations into account, as required by the Act.

Finally, there is no legal basis for CenturyTel's anticompetitive request to "toll" the effective date of the Petition until the Joint Board issues a set of recommendations more to CenturyTel's liking. CenturyTel had a chance to raise its concerns during the formulation of FCC and Joint Board policy in previous comment cycles. If it is dissatisfied with the outcome, the appropriate response is to petition for rulemaking. CenturyTel's absurd suggestion would justify the suspension of all of the FCC's rules on the theory that they may one day be revised.

For all of these reasons, the FCC should deny CenturyTel's Application for Review or, alternatively, Petition for Reconsideration.

Before the
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Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	
Universal Service	)	CC Docket No. 96-45
	)	
Petition by the Colorado Public Utilities	)	
Commission, Pursuant to 47 C.F.R.	)	
Section 54.207(c), for Commission	)	
Agreement in Redefining the Service	)	
Area of CenturyTel of Eagle, Inc., a	)	
Rural Telephone Company	)	

OPPOSITION OF N.E. COLORADO CELLULAR, INC.

N.E. Colorado Cellular, Inc. ("NECC")[1] hereby submits its Opposition to the Application for Review or, alternatively, Petition for Reconsideration ("Application") filed by CenturyTel of Eagle, Inc. ("CenturyTel") in the captioned proceeding on our about December 17, 2002.[2]

I. BACKGROUND

In mid-2000, NECC applied to the Colorado Public Utilities Commission ("CPUC") for designation as an eligible telecommunications carrier ("ETC") for the purpose of receiving federal universal service support, and for designation as an eligible provider ("EP"), which would entitle the company to receive state universal service funding. Because, as a wireless carrier, NECC is licensed to serve an area that does not match the service areas of the affected

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[1] NECC is a Commercial Mobile Radio Service ("CMRS") provider serving primarily rural areas in the northeastern portion of Colorado and the counties of Lincoln, Elbert, Kiowa, Crowley, and Cheyenne in the southern part of the state under call signs KNKR307 and KNKR327.

[2] CenturyTel's Application is undated; however, NECC assumes the pleading was filed on the same date on which it was served.

incumbent local exchange carriers ("ILECs"), NECC requested that its ETC/EP service area be defined to be coterminous with its FCC cellular geographic service area ("CGSA").

On December 21, 2001, Administrative Law Judge William J. Fritzel issued a decision ("*ALJ Recommended Decision*") concluding that a grant of NECC's request for designation as an ETC and as an EP would serve the public interest. Specifically, NECC's designation was to become effective immediately in non-rural areas served by Qwest and in rural areas where NECC's service area covered the ILEC service area completely. Regarding the rural areas only partially covered by NECC's licensed service territory, the ALJ found that NECC should be immediately designated "pending the resolution of the [CPUC's then ongoing] proceeding on disaggregation . . . and pending any necessary FCC approval of initial disaggregation of service areas for those wire centers set forth on Attachment 3[.]"[3] No party (including CenturyTel) filed exceptions, and the *ALJ Recommended Decision* became a final decision of the CPUC.

The CPUC's rulemaking proceeding on disaggregation, which had been pending at the time of NECC's designation, came to a close in early 2002.[4] Colorado's new rules on disaggregation, which took effect on June 30, 2002, closely tracked the FCC's disaggregation rules set forth in 47 C.F.R. § 54.315, enabling carriers to choose among three paths to disaggregate state and federal universal service support. The CPUC also concluded that "it would be anticompetitive to defer the redefinition [of] service areas to a new, possibly protracted adjudicative proceeding."[5] Accordingly, the rules also provide that an ILEC's choice of

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[3] *ALJ Recommended Decision*, Exh. 1 at pp. 6-7.

[4] *See Proposed Amendments to the Rules Concerning the Colorado High Cost Support Mechanism, 4 CCR 723-41, and the Rules Concerning Eligible Telecommunications Carriers, 4 CCR 723-42, Ruling on Exceptions and Order Vacating Stay*, Docket No. 01R-434T (mailed March 18, 2002) ("*Ruling on Exceptions*"); *Decision Denying Applications for Rehearing, Reargument and Reconsideration*, Decision No. C02-530 (mailed May 7, 2002).

[5] *Ruling on Exceptions* at p. 14.

disaggregation paths under the CPUC's rules will serve not only for the disaggregation of support, but also for the redefinition of the ILEC's service areas pursuant to 47 C.F.R. § 207.[6]

In May 2002, CenturyTel, whose study area is among those rural ILEC study areas only partially covered by NECC's licensed service territory, made its federal disaggregation filing under Path 3. Under this option, a carrier may self-certify the disaggregation of support either (1) to the wire center level; (2) below the wire center level, so long as support is disaggregated to no more than two cost zones per wire center; or (3) in another manner that complies with a previous regulatory determination by the CPUC.[7] Despite the requirement that Path 3 filings disaggregate support at or below the wire center level, CenturyTel's filing disaggregated to the wire center level, but purported to "re-aggregate" each of its 53 wire centers into one of two cost zones. The CPUC has since determined that CenturyTel's filing was invalid to the extent that it attempted to re-aggregate its wire centers into two cost zones, and that it should be construed as disaggregating support to the wire center level.[8]

On August 1, 2002, the CPUC submitted its Petition of the Public Utilities Commission of the State of Colorado to Redefine the Service Area of CenturyTel of Eagle, Inc., Pursuant to 47 C.F.R. § 207(c) ("Petition") requesting the FCC's concurrence with the CPUC's redefinition of CenturyTel's service area along wire center boundaries. In its Petition, the CPUC noted that "[t]he broader the service area, the more daunting the task facing a potential competitor seeking to enter the market as a competitive ETC within a rural exchange area."[9] In CenturyTel's service

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[6] *See* 4 CCR 723-42-11.

[7] *See* 47 C.F.R. § 54.315(d)(1); 4 CCR 723-42-10.3.1. The CPUC had made no previous regulatory determination regarding the disaggregation of support within CenturyTel's study area.

[8] *See* CPUC Reply Comments at pp. 3-4.

[9] Petition at p. 4.

area, the CPUC noted, "no company could receive designation as a competitive ETC unless it is able to provide service in 53 separate, non-contiguous wire centers located across the entirety of Colorado."[10] Because competitors would be forced to try to compete without the universal service funding CenturyTel receives, the CPUC emphasized that these circumstances present a "significant barrier to entry."[11] Redefinition along wire center boundaries, the CPUC concluded, would remove the last obstacle to entry by NECC and Western Wireless, *both of which had met all criteria for designation* except for the ability to provide service throughout the entirety of CenturyTel's service area as it was then defined.[12]

The FCC announced the Petition in a Public Notice[13] and gave interested parties an opportunity to comment on the requested redefinition. Comments, reply comments and *ex parte* presentations were filed by seven parties. In accordance with its rules — and as it has done on multiple occasions[14] — the FCC opted not to open a proceeding, and the redefinition was deemed automatically approved on November 25, 2002.

II. THE FCC PROPERLY DECLINED TO DUPLICATE THE PROCEEDINGS ALREADY CONDUCTED BY THE CPUC

A. CenturyTel's Concerns Were Addressed in Multiple Proceedings At the State Level and Should Not Be Re-litigated Here.

CenturyTel erroneously claims that the redefinition process has somehow been short-circuited, arguing that "[t]he FCC either should have initiated a proceeding pursuant to Section

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10 *Id.*

11 *Id.*

12 *See id.* at p. 7.

13 *See* Public Notice, *The Colorado Public Utilities Commission Petitions to Redefine the Service Area of CenturyTel of Eagle, Inc. in the State of Colorado*, DA 02-2087 (WCB rel. Aug. 26, 2002) ("Public Notice").

14 *See infra* n. 19 and accompanying text.

54.207(c)(3)(i) of its rules" or "issued an order explaining why the Colorado Petition was granted in the face of opposition[.]"[15] CenturyTel and all other interested parties have had multiple opportunities to object to and comment on the CPUC's proposed service area redefinition. CenturyTel may regret that it did not take advantage of each of those opportunities, but all of its arguments have been duly considered and all of the necessary determinations were made by the CPUC. In a Section 54.207(c) proceeding, all that is required is the FCC's concurrence, not an entirely new and duplicative proceeding. By filing the Petition, the CPUC provided the FCC with ample justification for a prompt concurrence. There is simply nothing more to be litigated.

Most notably, by foregoing the opportunity to file exceptions to the *ALJ Recommended Decision*, CenturyTel failed to challenge the ALJ's conclusion that NECC's designation in rural LEC service areas not covered in their entirety should be effective upon the conclusion of the CPUC's generic disaggregation proceeding and the FCC's concurrence with the CPUC's proposed redefinition.[16] The ALJ's conclusions clearly laid the groundwork for the Petition, and the FCC may legitimately question why CenturyTel failed to challenge those conclusions when it had the chance.

CenturyTel had another opportunity to challenge the relevant policy determinations when the CPUC conducted its proceeding in Docket No. 01R-434T to develop its rules on the disaggregation of support. Here, CenturyTel's interests were presumably represented by the Colorado Telecommunications Association ("CTA"), which participated in the proceeding and filed exceptions. After duly considering the arguments raised by CTA and other parties, the

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[15] Application at p. 7.

[16] *See ALJ Recommended Decision*, Exh. 1 at pp. 7, 9.

CPUC rejected challenges to its conclusions that state disaggregation of support should follow the federal rules and that the manner of study area disaggregation should also serve as the manner of service area redefinition.[17]

Having failed to challenge the CPUC's disaggregation policy head-on, CenturyTel attempted to circumvent the process in its Path 3 filing. While disaggregating support into 53 separate areas along wire center boundaries, CenturyTel also created two cost zones in an attempt to somehow "re-aggregate" its study area into two large areas, so as to prevent competitors from being designated as an ETC or EP without covering non-contiguous portions of either area. CenturyTel cleverly sought to block competition using Path 3 self-certification so as to avoid a Path 2 proceeding, which would have exposed it to immediate challenge.[18] The CPUC has studied CenturyTel's plan, determined that it should be properly treated as disaggregation by wire center, and has provided ample analysis in its Petition as to why the public interest will be served by redefining CenturyTel's service area along wire center boundaries.

Finally, Section 54.207(c) of the rules explicitly gives the FCC an option to either concur with a state petition or open a proceeding if it does not concur. Nothing in the rules or FCC orders requires the FCC to open a proceeding, and on at least two occasions, the FCC has allowed a redefinition proposal to take effect automatically, as it did here.[19] CenturyTel and six other parties have commented on the CPUC's Petition. Their concerns have been heard and

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[17] *See Ruling on Exceptions, supra.*

[18] But for the CPUC's Petition, which appropriately treated CenturyTel's filing as a wire center disaggregation, NECC (and possibly other carriers) would have objected to CenturyTel's Path 3 filing.

[19] *See* Public Notice, *Smith Bagley, Inc. Petitions for Agreement to Redefine the Service Area of CenturyTel of the Southwest, Inc. in the State of New Mexico,* DA 02-602 (rel. March 15, 2002) (effective date June 13, 2002); Public Notice, *Smith Bagley, Inc. Petitions for Agreement to Redefine the Service Areas of Navajo Communications Company, Citizens Communications Company of the White Mountains, and CenturyTel of the Southwest, Inc. On Tribal Lands Within the State of Arizona,* DA 01-409 (rel. Feb. 15, 2002) (effective date May 16, 2002).

there is absolutely nothing to indicate that the FCC has somehow ignored such submissions. The time for filing a petition for reconsideration of the FCC's adoption of Section 54.207(c) has long passed. If CenturyTel wishes to change the rule, it may file a petition for rulemaking.

In sum, CenturyTel had an opportunity to participate at several crucial junctures when the CPUC conducted its statutorily delegated determinations regarding NECC's designation as an ETC and EP, as well as the interplay between disaggregation and service area redefinition, that resulted in the CPUC's Petition. The CPUC properly analyzed CenturyTel's Path 3 filing and determined it to be a wire center disaggregation, which under Colorado law, applies to service area redefinition as well. CenturyTel's procedural and substantive rights have been fully protected and absolutely no purpose would be served by duplicating the CPUC's proceedings. Accordingly, CenturyTel's efforts to re-litigate the matter should be denied.

B. CenturyTel Improperly Asks the FCC to Overturn The CPUC's Public Interest Determination.

The CPUC has already found that designation of NECC as an ETC throughout its requested service area is in the public interest.[20] Specifically, when NECC was designated, it was determined that "NECC has satisfied all legal criteria for immediate designation as an ETC and should be granted such status immediately" pending the outcome of the CPUC's generic disaggregation proceeding and "any necessary FCC approval of initial disaggregation of service areas[.]"[21] As the CPUC noted in its Petition, the only reason NECC has not yet been designated as an ETC in any CenturyTel wire center "is that it lacks the facilities to serve *the entire CenturyTel study area*."[22] Thus, the public interest determination has already been made by the

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[20] *See ALJ Recommended Decision* at p. 6.

[21] *Id.*, Exh. 1 at pp. 6-7.

[22] Petition at p. 12 (emphasis in original).

state commission, in which exclusive authority lies pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended (the "Act").

CenturyTel's argument that the FCC should reject the CPUC's Petition because it fails "to satisfy the public interest standard set forth in Section 214(e)"[23] borders on absurd. It appears that CenturyTel is appealing the CPUC's original determination that a grant of ETC status to NECC would serve the public interest. That determination was made with finality twelve months ago. In contrast to the designation of additional ETCs in rural areas under Section 214(e)(2), the redefinition of service areas under Section 214(e)(5) does not require a public interest determination. Rather, the only requirement under that section is that the FCC and the states take into account the recommendations of the Joint Board. As demonstrated *infra*, this requirement has been satisfied.

CenturyTel's request that the FCC conduct an independent public interest determination, outside the bounds of Section 214(e)(5), must be rejected. Section 214(e) of the Act does not permit the FCC to overturn a state's public interest determination. Moreover, a state commission's public interest determination under Section 214(e)(2) is not a "statute, regulation, or legal requirement" and therefore is not subject to preemption by the FCC under Section 253(d). Because there is no legal basis for FCC preemption or reversal of the CPUC's public interest determination, CenturyTel's "public interest" arguments must be rejected.

C. This Is Not a "Contested" Matter Warranting Special Attention.

CenturyTel is mistaken in asserting that the "contested" nature of the review of the CPUC's Petition presented a compelling need to open a proceeding or issue a written order.[24]

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[23] Application at p. 9.

[24] *See id.* at p. 6.

The mere fact that an issue is raised by a commenter does require an agency to respond to it.[25] For this reason, the FCC has concluded that an application should not necessarily be removed from expedited review simply because it has been opposed.[26]

Additionally, during the comment period following the release of the Public Notice, CenturyTel and others opposing the Petition failed to raise legitimate arguments that might result in a "contested" proceeding. For example, CenturyTel does not stand to lose high-cost support as a result of competitive ETCs' receipt of support in its service area.[27] Accordingly, CenturyTel will not be harmed by the Petition and has no justifiable reason to contest it. Moreover, the comments submitted in opposition to the Petition focused entirely on arguments that have been soundly rejected by the FCC in prior proceedings,[28] are plainly ridiculous,[29] or concern broad

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[25] *See Thompson v. Clark*, 741 F.2d 401, 408-09 (D.C. Cir. 1984).

[26] *See Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations, Report and Order*, 17 FCC Rcd 5517, 5527 n.39 (2002); *1998 Biennial Regulatory Review — Review of International Common Carrier Regulations, Report and Order*, 14 FCC Rcd 4909, 4914 (1999).

[27] *See Cellular South License, Inc.*, DA 02-3317 (W.C.B. rel. Dec. 4, 2002) at ¶ 28 ("*Cellular South Alabama ETC Order*"); *RCC Holdings, Inc. Petition*, DA 02-3181 (W.C.B. rel. Nov. 27, 2002) at ¶ 26 ("*RCC Alabama ETC Order*") (recon. pending).

[28] For example, CenturyTel, the Independent Telephone and Telecommunications Alliance ("ITTA"), the National Telecommunications Cooperative Association ("NTCA") and NRTA, OPASTCO, Western Alliance and CTA ("NRTA") all devoted substantial portions of their comments to discussing the possibility of "cherry picking" or "cream skimming", a prospect which the FCC has previously found to be "substantially eliminated" by rural ILECs' opportunity to disaggregate support, as CenturyTel did with its Path 3 filing. *See, e.g., Cellular South Alabama ETC Order, supra*, at ¶ 31; *RCC Alabama ETC Order, supra*, at ¶ 31; *Petitions for Reconsideration of Western Wireless Corporation's Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, FCC 01-311 at ¶ 12 (rel. Oct. 19, 2001); *Federal-State Joint Board on Universal Service, Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, FCC 01-283 at ¶ 20 (rel. Oct. 5, 2001).

[29] For example, NRTA's Comments, at p. 8, contain a heading stating that "The Proper Designation Area Is Only One Element of the Comprehensive Public Interest Finding Required Before an Additional ETC May Lawfully Be Designated in an Area Served by a Rural Carrier" — even though the public interest determination under Section 214(e)(2) lies with the state and was made a year ago.

universal service policy issues best addressed in separate, global rulemaking proceedings,[30] and therefore did not raise any issues properly contested in the course of a redefinition proceeding.

D. CenturyTel's Collateral Objections Have No Merit.

In its Application, CenturyTel incorporates by reference its initial comments filed in response to the Public Notice.[31] Those comments raise a host of collateral issues — such as the need for a minimum number of local minutes, restrictions on mobility, and "windfalls" to competitive ETCs whose costs may differ from ILECs' — that are programmatic in nature and are not properly raised in a service area redefinition proceeding. To the extent CenturyTel reiterates these arguments in its Application by reference, NECC incorporates by reference its own responses which are found in its reply comments. With respect to the remaining arguments in the Application, NECC provides its responses below.

i) "Cherry Picking"

CenturyTel makes much of the idea that redefinition along wire center boundaries will encourage competitors to engage in "cherry picking" by targeting CenturyTel's "best least-cost, highest-profit customers."[32] Aside from the inexplicable value judgment that CenturyTel considers customers in its low-cost areas to be its "best" customers, this argument is without merit because CenturyTel's disaggregation filing has already addressed such concerns.

In that filing, CenturyTel divided up its study area into 53 wire centers, as permitted under Section 54.315(d)(1)(i). CenturyTel then took the unauthorized step of grouping the wire

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[30] For example, CenturyTel urged the FCC to address "windfall" support allegedly received by competitive ETCs whose cost structures differ from those of ILECs; impose "mobility restrictions" for the first time on a competitive ETC; and establish a minimum level of local usage for ETC designation.

[31] *See* Application at p. 9.

[32] *Id.*

centers into two broad cost zones, which is only permitted under Path 2, or under Path 3 with prior regulatory authorization. As the FCC has emphasized, "cream skimming" or "cherry picking" concerns are "substantially eliminated by the proper disaggregation of support.[33] To the extent CenturyTel's plan is not "reasonably related to the cost of providing service for each disaggregation zone within each disaggregated catetory of support",[34] both federal and state rules permit the modification of such plan in a proceeding initiated by the CPUC, CenturyTel, or another party.[35] The CPUC has properly taken note of the noncompliance of CenturyTel's disaggregation filing with the state and federal rules governing disaggregation of high-cost funds,[36] and has properly determined that CenturyTel's plan disaggregates support to the wire center level. The "cherry picking" argument is now, decisively, off the table.

ii) Resale Requirement

CenturyTel is also mistaken in arguing that competitive ETCs should be required to offer resold services if they lack the facilities to serve every portion of an ILEC's study area.[37] Tellingly, CenturyTel fails to cite any FCC or state decision requiring a competitive ETC to use resale as a condition for ETC status. Such a requirement would be inappropriate, for several reasons. First, it would directly contradict the FCC's conclusions that an important benefit of competitive entry in rural areas is "the deployment of new facilities and technologies" as well as the creation of an "incentive to the incumbent rural telephone companies to improve their

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33 *See, e.g., Cellular South, supra,* at ¶ 31; *RCC Holdings, supra,* at ¶ 31.

34 47 C.F.R. § 54.315(d)(2)(ii); 4 CCR 723-42-10.3.2.2.

35 *See* 47 C.F.R. § 54.315(d)(5); 4 CCR 723-42-10.3.5.

36 *See* CPUC Reply Comments at pp. 3-5.

37 *See* Application at p. 10.

existing network to remain competitive."[38] Second, because of the sunset of the FCC's rule requiring resale in November 2002, NECC is by no means assured of the continued cooperation of other carriers or the ability to resell facilities pursuant to reasonable rates, terms, and conditions.

Third, any requirement to provide resold services can only be properly applied within NECC's licensed service area, where it has an incentive and ability to construct facilities. Outside of its service area, long-term resale would be completely unworkable for NECC and for Colorado consumers. NECC would not be able to control other carriers' wireless networks, leaving it unable to provision service, improve service, or make any necessary network adjustments to provide appropriate service quality. NECC would not be able to ensure that it could meet any ETC commitments, such as toll blocking or toll limitation. At best, NECC could offer a resold wireline service to customers, which is no choice at all.

III. THE FCC IS NOT REQUIRED TO ISSUE A WRITTEN ORDER OR OTHERWISE PROVIDE "EVIDENCE"

A. Section 214(e)(5) Does Not Require a Written Order.

Section 214(e)(5) of the Act provides that:

> In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition of service area for such company.

Nowhere does the statute mention any requirement that the FCC issue written orders, decisions, findings of fact or conclusions of law, as suggested by CenturyTel. Nor does the

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[38] *See Western Wireless Corp., Petition for Designation as an Eligible Telecommunications Carrier in the State of Wyoming*, 16 FCC Rcd 48, 55 (2000) ("*Western Wireless*"). *See also* Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Goldman Sachs Communicopia XI Conference, New York,

provision state that the FCC must provide "evidence" that it took the Joint Board's recommendations into consideration. CenturyTel ignores the many other statutory provisions, in the Act and elsewhere, which, unlike Section 214(e)(5), explicitly call for written orders, decisions, reasons, findings, or conclusions.[39] In fact, in its illustrative use of Section 252(e), CenturyTel fails to mention that the same section provides that "[a] State commission to which an agreement is submitted shall approve or reject the agreement, *with written findings* as to any deficiencies."[40]

Congress did not require a written decision. It gave the FCC discretion to develop the procedures that are necessary and appropriate to implement the statute.[41] As discussed below, the FCC properly exercised its discretion by implementing a streamlined redefinition procedure that is consistent with the Act's purposes. Moreover, administrative law favors granting procedural flexibility to agencies rather than requiring judicial-style findings of fact.[42]

NY (Oct. 2, 2002) ("Only through facilities-based competition can an entity bypass the incumbent completely and force the incumbent to innovate to offset lost wholesale revenues.")

[39] *See, e.g.*, 47 U.S.C. § 271(d)(3) ("... the Commission shall issue a written determination approving or denying the authorization requested in the application for each State . . . The Commission shall state the basis for its approval or denial of the application."); 47 U.S.C. § 309(d)(2) ("If the Commission finds . . . it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition."); 47 U.S.C. § 626(c)(3) ("the franchising authority shall issue a written decision granting or denying the proposal for renewal . . . and transmit a copy of such decision to the cable operator. Such decision shall state the reasons therefor."); 5 U.S.C. § 7117(c)(6) ("The Authority shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date."); 16 U.S.C. § 1536(b)(4) (requiring Secretary of the Interior to provide "written statement" specifying the impact of a proposed undertaking on endangered or threatened species, any necessary and appropriate measure to minimize those impacts, and any terms and conditions to be imposed on the Federal agency or applicant); 20 U.S.C. § 1234f(2) ("...the Secretary shall make written findings to that effect and shall publish those findings, along with the substance of any compliance agreement, in the Federal Register."); 23 U.S.C. § 131(*l*) ("... the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination[.]").

[40] 47 U.S.C. § 252(e)(1) (emphasis added).

[41] *See Southern Co. v. F.C.C.*, 293 F.3d 1338, 1348 (11th Cir. 2002).

[42] *See F.C.C. v. RCA Communications et al.*, 346 U.S. 86, 97, 73 S.Ct. 998, 1005 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would

B. The FCC's Service Area Redefinition Procedures Serve the Pro-Competitive Objectives of the Act.

CenturyTel's assertion that the FCC's failure to issue a written decision somehow represents "abdication" of its statutory responsibilities[43] is incorrect.[44] The streamlined procedure the FCC developed for redefining rural LEC service areas, set forth in Section 54.207(c)(3)(ii) of its rules, is entirely consistent with the purposes of the Act and with FCC practice. Although CenturyTel claims the FCC adopted this procedure "without any explanation for its decision,"[45] the FCC stated its reasons quite clearly:

> [W]e conclude that the "pro-competitive, de-regulatory" objectives of the 1996 Act would be furthered if we minimize any procedural delay caused by the need for federal-state coordination on this issue . . . In keeping with our intent to use this procedure to minimize administrative delay, we intend to complete consideration of any proposed definition of a service area promptly.[46]

Thus, it is clear that the expedited procedure adopted under Section 214(e)(5) serves to remove barriers to competitive entry with minimal delay, while affording interested parties ample opportunity to be heard.

The removal of barriers to competitive entry furthers the statutory purpose of the Act, which is "[t]o promote competition and reduce regulation in order to secure lower prices and

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disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.'").

[43] Application at p. 7.

[44] Just as CenturyTel is late in expressing disagreement with Colorado policy concerning "parallel funding disaggregation and entry disaggregation" (Application at p. 5), CenturyTel similarly chooses an inappropriate forum to ask the FCC to rescind — apparently without a public process of any kind — its service area redefinition rules. *See id.* at p. 6.

[45] *Id.* at p. 4.

[46] *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8881 (1997) ("*First Report and Order*").

higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[47] Moreover, the FCC has declared competitive neutrality as one of the overarching principles of universal service, meaning that the universal service rules should not unfairly advantage or disadvantage any service provider or technology over another.[48] By eliminating the need for prolonged consideration and written findings except in extraordinary cases, the FCC's redefinition rules ensure that competitive ETCs can begin to compete on a level playing field without undue delay.

CenturyTel also overlooks the critical fact that such streamlined review is accepted FCC practice, particularly where the public interest is disserved by unnecessarily protracted administrative proceedings. For example, when reviewing domestic authorizations under Section 214, the FCC uses a procedure which, like its rules under Section 207(c), consists of a notice-and-comment period and automatic approval in the absence of FCC action.[49] As with the service area redefinition rules, the FCC's domestic authorization rules envision that this determination may be made without a written order and without initiating further proceedings. The FCC adopted similar procedures for international authorizations.[50] By arguing that the FCC has abdicated its statutory obligations, CenturyTel simply ignores the FCC's longstanding practice of using streamlined review. Such a procedure is particularly appropriate where the state authority has already conducted a detailed review of the underlying issues and where the FCC's statutory obligation consists of concurrence, not *de novo* review.

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47 Pub. L. No. 104-104, 110 Stat. 56 (1996) (preamble).

48 *See First Report and Order, supra*, 12 FCC Rcd at 8801.

49 *See* 47 C.F.R. § 63.03(a).

50 *See* 47 C.F.R. § 63.12(c).

C. There is Already Clear "Evidence" that the FCC Considered the Joint Board's Recommendations.

CenturyTel incorrectly states that "it is apparent that the FCC failed to satisfy its Section 214(e)(5) obligation to take into consideration the Joint Board's recommendation before changing CenturyTel's study area"[51] and claims that there is no "evidence" that the FCC actually considered the Joint Board's recommendations.[52] In fact, the evidence to this effect is quite clear.

The service area redefinition rules are the product of the FCC's consideration of the Joint Board's recommendations. Indeed, the FCC expressly discussed, and followed, the Joint Board's analysis and recommendations when adopting these rules. For example, the FCC explicitly stated its agreement with the Joint Board that the adoption of a large ILEC's study area as an ETC service area would erect significant barriers to competitive entry and might even violate the Act.[53] In fact, the FCC made explicit mention of the Joint Board's recommendations several times in adopting the service area redefinition procedures:

- "We agree with the Joint Board that, although this authority is explicitly delegated to the state commissions, states should exercise this authority in a manner that promotes the pro-competitive goals of the 1996 Act as well as the universal service principles of section 254";
- "We also adopt the Joint Board's analysis and recommendation that states designate service areas that are not unreasonably large";
- "We also agree with the Joint Board's determination that large service areas increase start-up costs for new entrants, which might discourage competitors from providing service throughout an area";
- "We also agree with the Joint Board that, if a state adopts a service area that is simply structured to fit the contours of an incumbent's facilities, a

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51 Application at p. 6. NECC notes that CenturyTel's "study area" has not been changed.

52 Application at p. 5.

53 *See First Report and Order, supra*, 12 FCC Rcd at 8879.

new entrant, especially a CMRS-based provider, might find it difficult to conform its signal or service area to the precise contours of the incumbent's area, giving the incumbent an advantage";

- "As noted by the Joint Board, state designation of an unreasonably large service area could also violate section 253 if it 'prohibit[s] or ha[s] the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service' and is not 'competitively neutral' and 'necessary to preserve and advance universal service'".[54]

Clearly, the procedures adopted under Section 214(e)(5) represent the outcome of the FCC's careful consideration of the Joint Board's recommendations regarding the definition of service areas. *The Act does not require the FCC to engage in a top-to-bottom reexamination of the Joint Board's recommendations with every concurrence decision.*

CenturyTel also ignores the fact that the procedures under Section 54.207(c) are expressly designed to ensure that interested parties have the opportunity to brief the FCC on the Joint Board's recommendations and other issues. The Petition itself contained a discussion following the analytical framework provided by the Joint Board for determinations of the proper definition of 'service area.'[55] Additionally, the comments, reply comments, and *ex parte* comments filed in response to the Public Notice all contained extensive discussion of the Joint Board's recommendations in arguing for or against the CPUC's proposed redefinition. By reviewing and considering the Petition and comments, the FCC necessarily took into account the recommendations that were discussed by the commenting parties. Accordingly, the FCC's redefinition procedures ensured that its concurrence with the CPUC's Petition occurred only "after taking into account" the Joint Board's recommendations as required by Section 214(e)(5).

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[54] *Id.* at 8879-80.

[55] *See* Petition at pp. 8-11.

IV. CENTURYTEL'S REQUEST TO TOLL THE PETITION'S EFFECTIVE DATE SHOULD BE REJECTED

Apparently conceding that the Joint Board's recommendations to date would not provide any justification for a delay or denial of the CPUC's Petition, CenturyTel seeks to delay the effective date of the grant of the Petition until the Joint Board issues another set of recommendations.[56] CenturyTel's request is patently anti-competitive. It seeks to be spared the competition that NECC's designation will bring and, with it, the pressure to reduce inefficiencies and improve service to customers. The filing of a petition for reconsideration or application for review does not toll the effectiveness of an FCC decision[57] and CenturyTel has not demonstrated any compelling reason for the Commission to stay its decision.

Indeed, CenturyTel has not requested a stay pending consideration of its Application; instead, it wishes to preserve the status quo "until the Joint Board has made its recommendation regarding the interplay between the level of disaggregation of support and changes in rural study area definitions."[58] In other words, finding the current state of the law unsatisfactory, CenturyTel absurdly seeks to place competitive entry in suspended animation in hopes that the rules will one day change in its favor. If litigants could stay the effectiveness of every rule that has some chance of being amended in the future (*i.e.*, every rule), the rulemaking and enforcement authority granted to the FCC by statute would be rendered meaningless. CenturyTel's "tolling" request must be rejected.

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[56] *See id.* at pp. 7-8.

[57] *See* 47 C.F.R. §§ 1.102(b)(2)-(3).

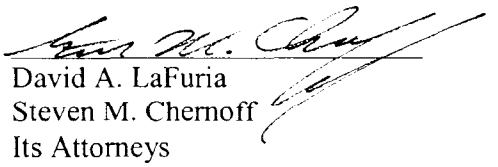
[58] Application at p. 8.

V. CONCLUSION

For the reasons stated above, NECC urges the FCC to deny CenturyTel's Application.

Respectfully submitted,

N.E. COLORADO CELLULAR, INC.

By: 

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CERTIFICATE OF SERVICE

I, Jennifer C. Colman, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, hereby certify that I have, on this 2nd day of January, 2003, placed in the United States mail, first-class postage pre-paid, a copy of the foregoing *Opposition of N.E. Colorado Cellular, Inc.* filed today to the following:

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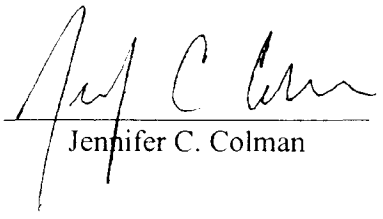

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